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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
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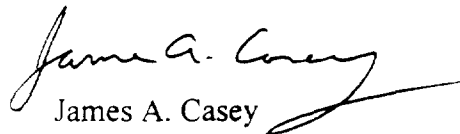
Re: Petition for Designation as an Eligible Telecommunications Carrier
Pursuant to Section 214(e)(6) of the Communications Act, FCC 97-
419

Dear Ms. Salas:

Transmitted herewith, is an original and five copies of the Petition of the Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, FCC 97-419. To expedite this filing, we are filing a facsimile copy of the Certification of J. D. Williams (Attachment 3). We will file the original signed certification as soon as it is available.

Should there be any questions regarding this filing, please communicate with the undersigned counsel.

Very truly yours,



James A. Casey
Counsel for
Cheyenne River Sioux Telephone
Authority

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

**Petition of the Cheyenne River Sioux
Tribe Telephone Authority for
Designation as an Eligible
Telecommunications Carrier Pursuant to
Section 214(e)(6) of the Communications
Act, FCC 97-419**

Docket No. _____

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Petition of the Cheyenne River Sioux
Tribe Telephone Authority for
Designation as an Eligible
Telecommunications Carrier Pursuant to
Section 214(e)(6) of the Communications
Act, FCC 97-419**

Docket No. _____

I. SUMMARY

The Cheyenne River Sioux Tribe Telephone Authority ("Telephone Authority") respectfully petitions the Commission for designation as an eligible telecommunications carrier ("ETC") pursuant to § 214(e)(6) of the Communications Act (codified as amended at 47 U.S.C. § 214(e)), and 47 C.F.R. §§ 54.201 to 54.207, within its local exchange carrier ("LEC") service area. The Public Utilities Commission of South Dakota ("SDPUC") does not have jurisdiction to designate the Telephone Authority as an ETC for purposes of the Communications Act. Therefore, the Telephone Authority is "a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission." 47 U.S.C. § 214(e)(6).

The Cheyenne River Indian Reservation defines the Telephone Authority's service area. Prior to the enactment of Pub. L. No. 105-125, 111 Stat. 2540 (1997), as the governing body of the federally recognized Indian tribe with jurisdiction within the exterior boundaries of the

Reservation, the Cheyenne River Sioux Tribe designated the Telephone Authority as an ETC for the Reservation. Although the Telephone Authority asserted that the SDPUC did not have jurisdiction to implement the Communications Act within Reservation boundaries, the SDPUC also recognized that the Telephone Authority meets the requirements for designation as an ETC for its service area, and has designated the Telephone Authority as an ETC for the exchanges it serves. By this petition, the Telephone Authority respectfully requests that the Commission confirm that the Telephone Authority is an ETC for its service area.

II. STATUTORY REQUIREMENTS

Telecommunications carriers may receive federal funds to support universal service. The goal of universal service is to ensure access to quality telecommunications services at affordable rates in rural and high cost areas, as well as to low income consumers, libraries and schools. See 47 U.S.C. § 254(b).

The Communications Act provides that “only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support.” 47 U.S.C. § 254(e). Thus, the threshold requirement for receiving federal universal service support is receiving designation as an ETC. The Act states:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1).

47 U.S.C. § 214(e)(2). Where State commissions do not have jurisdiction to designate ETCs, the Commission must do so:

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law.

Pub. L. No. 105-125, 111 Stat. 2540 (1997) (codified as 47 U.S.C. § 214(e)(6)).

Section 214(e) allows designated ETCs to receive federal universal service support funds in their service areas if they offer the required services and advertise the availability of such services. 47 U.S.C. § 214(e)(1). In order to receive ETC designation from a state utilities commission, a telecommunications carrier must demonstrate that it can provide: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equal; (4) single party services or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. §§ 54.101(a), 54.201. As the Telephone Authority demonstrates below, it satisfies all of the statutory and regulatory requirements for designation as an ETC.

III. THE TELEPHONE AUTHORITY IS NOT SUBJECT TO STATE JURISDICTION

A. DESCRIPTION OF SERVICE AREA.

The Telephone Authority is a tribal entity, established by the Cheyenne River Sioux Tribe's Ordinance 24 (Attachment 1 hereto). It is undisputed that the Cheyenne River Sioux Tribe is the government with sovereign authority to act within the exterior boundaries of the Cheyenne River Indian Reservation. See Memorandum Decision at 28-30, Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Comm'n of S.D., Civ. No. 95-288 (6th Cir. Ct. Feb. 21, 1997) ("State Court Decision") (Attachment 2 hereto).¹ The Commission has recognized the sovereign authority of Indian tribal governments, and has expressed a "proper respect both for tribal sovereignty itself and for the plenary authority of Congress." In the Matter of AB Fillins, No. FCC 97-238, 1997 WL 431386 ¶ 18 (FCC July 2, 1997) (citation omitted).²

¹Certain determinations of the SDPUC and the South Dakota Circuit Court in proceedings to determine whether the Telephone Authority may purchase three telephone exchanges from U S WEST COMMUNICATIONS, Inc. are relevant to the instant petition. In the Matter of the Sale of Certain Telephone Exchanges by U S WEST COMMUNICATIONS, Inc. to Certain Telecommunications Companies in South Dakota, Nos. TC94-122-Morristown, TC94-122-McIntosh, TC94-122-Timber Lake ("Sales Proceedings"); Cheyenne River Sioux Tribe Tel. Auth. v. Public Util. Comm'n of S.D., No. 95-288 (S.D. Cir. Ct.). The Telephone Authority references the relevant determinations here and attaches them hereto for the Commission's convenience. With respect to the State Court Decision, the Telephone Authority and U S WEST have jointly appealed to the South Dakota Supreme Court the issue of whether federal law preempts the application of state law so as to prevent the Telephone Authority's purchase of additional telephone exchanges from US WEST. That appeal is stayed pending the outcome of the present proceeding before the South Dakota Circuit Court after remand to the SDPUC on issues other than the federal preemption issue.

²Because it is a division of the Cheyenne River Sioux Tribe, the Telephone Authority has sovereign immunity. By filing this petition, the Telephone Authority does not waive its sovereign immunity, nor is anything contained herein intended to be construed as such a waiver.

Under the authority delegated to it by the Tribe in Ordinance 24, the Telephone Authority is a rural telephone company pursuant to § 3(37) of the Communications Act, 47 U.S.C. § 153(37), that provides telecommunications services in its study area identified by the following telephone exchanges, all of which are located within the exterior boundaries of the Cheyenne River Indian Reservation: Isabel, No. 466; Dupree, No. 365; South Dupree, No. 538; La Plant, No. 733; and Eagle Butte, No. 964. Thus, the Reservation comprises the Telephone Authority's service area. See Act of March 2, 1889, ch. 405, § 4, 25 Stat. 888, 889 (defining boundaries of the Cheyenne River Indian Reservation).

B. THE SDPUC DOES NOT HAVE JURISDICTION WITHIN RESERVATION BOUNDARIES, OR CONSEQUENTLY WITHIN THE TELEPHONE AUTHORITY'S SERVICE AREA.

The SDPUC does not have jurisdiction over the Telephone Authority within the exterior boundaries of the Reservation. It is settled "that the State has no authority over tribal enterprises like the CRSTTA conducting business on the Cheyenne River Sioux Reservation." State Court Decision at 12. See also Certification of J.D. Williams ¶ 1 (Jan. 2, 1998) (Attachment 3 hereto). Prior to its amendment on December 1, 1997, Pub. L. No. 105-125, 111 Stat. 2540 (1997), the Communications Act required only that the "State commission" designate ETCs. 47 U.S.C. § 214(e)(2). The SDPUC, however, cannot designate the Telephone Authority as the ETC within Reservation boundaries because it lacks regulatory jurisdiction over tribal telephone operations there. Thus, while section 214(e)(2) of the Act was not facially ambiguous, an extrinsic ambiguity arose with respect to the Telephone Authority because the goal of the provision could not be satisfied through a literal reading of the language.

In Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490 (7th Cir. 1993), the court held that reference by Congress to one government -- the State commission -- must necessarily include the government with jurisdiction to act -- in this case the Cheyenne River Sioux Tribe. In such a situation, the court cannot read the statute literally because to do so would render the statute senseless.

[L]iteral readings of statutes -- readings that refuse to take into account any ambiguities that are not visible on the face of the statute -- are rather in vogue in the Supreme Court these days [Yet] even literalists do not interpret statutes literally when doing so would produce a result senseless in the real world. Even literalists, that is to say, acknowledge the applicability to statutes of the principle of contract interpretation that allows the courts to seek meaning beneath the semantic level not only when there is an "intrinsic" ambiguity in the contract but also when there is an "extrinsic" one, that is, when doubt that the literal meaning is the correct one arises only when one knows something about the concrete activities that the contract was intended to regulate.

Id. at 493-494 (citations omitted). See also Citicorp Industrial Credit, Inc. v. Brock, 483 U.S. 27 (1987); Green v. Bock Laundry Machine Co., 490 U.S. 504, 527-530 (1989) (concurring opinion). Thus, Congress' failure to mention that Indian tribal governments must designate ETCs operating within Indian reservations for purposes of the Communications Act was oversight. See Reich, 4 F.3d at 494. Moreover, as a matter of comity, the Cheyenne River Sioux Tribe must implement the Act within Reservation boundaries, just as the SDPUC must implement the Act elsewhere in the state. Id. at 495. Therefore, prior to the enactment of Pub. L. No. 105-125, the term "State commission" as used in the Act must be read to include the Cheyenne River Sioux Tribe as the government with jurisdiction to designate ETCs within Reservation boundaries.

Accordingly, under the scheme in place prior to Congress' amendment of the Communications Act, the Cheyenne River Sioux Tribe implemented the Act, and designated the Telephone Authority as the ETC for the Isabel, Dupree, South Dupree, La Plant, and Eagle Butte telephone exchanges. Examining each of the requirements of the Commission's regulations, the Tribe designated the Telephone Authority as an ETC within the Reservation:

[T]he Cheyenne River Sioux Tribe finds that the Cheyenne River Sioux Tribe Telephone Authority uses its own facilities-based network to provide: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; and (8) access to directory assistance; and

* * * *

the Cheyenne River Sioux Tribe finds that the Cheyenne River Sioux Tribe Telephone Authority provides toll blocking, but toll control is virtually unavailable within the United States because it requires instantaneous real time call rating. Accordingly, the Cheyenne River Sioux Tribe grants a suspension of this requirement for eligible telecommunications carrier designation to the extent that such a suspension is required.

* * * *

the Cheyenne River Sioux Tribe designates the Cheyenne River Sioux Tribe Telephone Authority as an eligible telecommunications carrier within its local exchange area.

Cheyenne River Sioux Tribe Resolution No. 337-97-CR (Nov. 5, 1997) (Attachment 4 hereto).

Because the Communications Act was ambiguous as applied to Indian tribal entities, and because of the serious consequences of failing to receive ETC designation, the Telephone Authority also applied to the SDPUC for ETC designation as a precautionary measure. In so

doing, the Telephone Authority expressly stated that the SDPUC did not have jurisdiction within Reservation boundaries, but it applied to the SDPUC in any event because of the ambiguous nature of the Act. On December 11, 1997, the SDPUC found that the Telephone Authority satisfied the requirements for designation as an ETC for its service area, and designated the Telephone Authority the ETC for the Isabel, Dupree, South Dupree, La Plant, and Eagle Butte telephone exchanges. *Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order, In the Matter of the Filing by Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier*, No. TC97-184 (Dec. 17, 1997) ("SDPUC ETC Decision") (Attachment 5 hereto). Pursuant to 47 C.F.R. § 54.101(c), the SDPUC granted the Telephone Authority a waiver of the requirement to provide toll control services until December 31, 1998 "due to technology limitations." *Id.* at 3, ¶ XXI. The SDPUC subsequently notified the Universal Service Administrator that it had designated the Telephone Authority as an ETC for its service area. Letter from South Dakota Public Utilities Commission to Universal Service Administrator at 2 (Dec. 18, 1997).

On December 1, 1997, Congress enacted Pub. L. No. 105-125, 111 Stat. 2540, which provides that the Commission must entertain requests for ETC designation where state commissions do not have jurisdiction. 47 U.S.C. § 214(e)(6). Congress thereby clarified the ambiguity of the Communications Act as applied to Indian tribes and tribal entities operating within Indian reservation boundaries. It is now clear that where a state commission does not have jurisdiction, the Commission must designate ETCs upon request. Pursuant to the statutory amendment, the Telephone Authority respectfully requests that the Commission confirm the

designations of the Cheyenne River Sioux Tribe and the SDPUC that the Telephone Authority is an ETC for the exchanges it serves.

The Commission has stated that, “[a]ny carrier that is able to be or has already been designated as an eligible telecommunications carrier by a state commission is not required to receive such designation from the Commission.” Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, FCC 97-419 at 2 (Dec. 29, 1997). Yet, there is a question whether the SDPUC has jurisdiction to implement the Communications Act within Reservation boundaries. Even though the Telephone Authority argued that the SDPUC did not have such jurisdiction, and requested ETC designation from the SDPUC as a precaution, the SDPUC nevertheless determined that it had jurisdiction to designate the Telephone Authority as an ETC for its service area -- the Reservation. SDPUC ETC Decision at 4, ¶ 1. In the event that the related Sales Proceedings result in a determination that the SDPUC does not have jurisdiction within Reservation boundaries, see Note 1, supra, the continued validity of the SDPUC’s designation of the Telephone Authority as an ETC may be in question. Accordingly, the Telephone Authority requests that the Commission confirm that the Telephone Authority is an ETC for its service area.³

As demonstrated below, the Telephone Authority satisfies the regulatory requirements for designation as an ETC.

³As noted in the Commission’s December 29, 1997 Public Notice, footnote 4, neither Pub. L. No. 105-125 nor the designation of a carrier as an ETC by the Commission is intended to resolve questions of tribal versus state jurisdiction. The Telephone Authority maintains its position that the SDPUC does not have jurisdiction over the Telephone Authority within the exterior boundaries of the Cheyenne River Indian Reservation. See Certification of J.D. Williams ¶ 1.

**IV. THE COMMISSION SHOULD CONFIRM OR
DESIGNATE THE TELEPHONE AUTHORITY AS
AN ETC**

A. DESIGNATION OF THE TELEPHONE AUTHORITY AS AN ETC SERVES THE PUBLIC INTEREST.

The Telephone Authority operates in a rural area and is eligible to receive cost recovery from interstate mechanisms established to foster universal service, and the customers who it serves are the beneficiaries of the existing universal service cost recovery mechanisms. If the Telephone Authority did not have access to existing interstate universal service cost recovery sources, the Telephone Authority, and its customers, would face unnecessary shortfalls in the recovery of universal service costs, contrary to both 47 U.S.C. § 254 and the Commission's policy of promoting universal service. Beginning January 1, 1998, the Telephone Authority will be qualified to receive federal universal service support funds only if it is an ETC. 47 C.F.R. § 54.201(a)(1). The Commission's expeditious action to confirm the Telephone Authority's designation as an ETC will allow the Telephone Authority to continue to receive uninterrupted interstate cost recovery support while assuring that its customers continue to receive the benefits of quality telecommunications services at reasonable rates. Therefore, the Commission's grant of this petition will serve the public interest, convenience and necessity.

B. THE TELEPHONE AUTHORITY SATISFIES THE REQUIREMENTS FOR ETC DESIGNATION.

Using its own facilities, Certification of J.D. Williams ¶ 3, the Telephone Authority meets the following requirements for designation as an ETC for its service area:

1. As required by 47 C.F.R. § 54.101(a)(1), the Telephone Authority provides voice grade access to the public switched network, using all digital switches, fiber optic cable and equal

access conversion. Affidavit of J.D. Williams ¶ 3(A) (Nov. 13, 1997) (Attachment 6 hereto); SDPUC ETC Decision at 2, ¶ VI; Certification of J.D. Williams ¶ 2.

2. As required by 47 C.F.R. § 54.101(a)(2), the Telephone Authority provides local usage free of per-minute charges under a flat-rated local service package. Affidavit of J.D. Williams ¶ 3(B); SDPUC ETC Decision at 2, ¶ VII; Certification of J.D. Williams ¶ 2.

3. As required by 47 C.F.R. § 54.101(a)(3), the Telephone Authority provides dual tone multi-frequency signaling. Affidavit of J.D. Williams ¶ 3(C); SDPUC ETC Decision at 2, ¶ VIII; Certification of J.D. Williams ¶ 2.

4. As required by 47 C.F.R. § 54.101(a)(4), the Telephone Authority provides "single party service to all subscribers [] in Dewey and Ziebach Counties, which is the entire Cheyenne River Sioux Reservation." Transcript of April 17, 1995 hearing at 119, Sales Proceedings ("TR") (Attachment 7 hereto). Accord Affidavit of J.D. Williams ¶ 3(D); SDPUC ETC Decision at 2, ¶ IX; Certification of J.D. Williams ¶ 2.

5. As required by 47 C.F.R. § 54.101(a)(5), the Telephone Authority provides access to emergency services, including "free firebar service to all its service communities." TR at 124. See also SDPUC ETC Decision at 2, ¶ X; Certification of J.D. Williams ¶ 2. The Telephone Authority has also recently implemented 911 and enhanced 911 emergency services in accordance with an agreement with Dewey and Ziebach counties whose governments approved the imposition of the 911 and enhanced 911 tax so that the Telephone Authority could implement these services. See Attachment 8 hereto (newspaper notices of Counties' agreement to 911 charge). See also TR at 125; Affidavit of J.D. Williams ¶ 3(E).

6. As required by 47 C.F.R. § 54.101(a)(6), the Telephone Authority provides access to operator services. Affidavit of J.D. Williams ¶ 3(F); SDPUC ETC Decision at 2, ¶ XI; Certification of J.D. Williams ¶ 2.

7. As required by 47 C.F.R. § 54.101(a)(7), the Telephone Authority provides access to interexchange service by consistently offering extended area service to all its customers. TR at 127-128; Affidavit of J.D. Williams ¶ 3(G); SDPUC ETC Decision at 2, ¶ XII; Certification of J.D. Williams ¶ 2.

8. As required by 47 C.F.R. § 54.101(a)(8), the Telephone Authority provides access to directory assistance. Affidavit of J.D. Williams ¶ 3(H); SDPUC ETC Decision at 2, ¶ XIII; Certification of J.D. Williams ¶ 2.

9. As required by 47 C.F.R. § 54.101(a)(9), the Telephone Authority provides toll blocking to its customers. SDPUC ETC Decision at 3, ¶ XV; Certification of J.D. Williams ¶ 2. The Telephone Authority will provide toll limitation services, including Lifeline, 47 C.F.R. § 54.401, and Link Up, 47 C.F.R. § 54.411, when toll limitation becomes technologically available. Affidavit of J.D. Williams ¶ 4; SDPUC ETC Decision at 3-4, ¶¶ XVI, XIX, XXII; id. at 5, ¶ VI. Pursuant to 47 C.F.R. § 54.101(c), because the Telephone Authority meets all other requirements for designation as an ETC, the Telephone Authority respectfully requests that the Commission grant it "additional time to complete the network upgrades needed to provide . . . toll limitation." Affidavit of J.D. Williams ¶ 4; Certification of J.D. Williams ¶ 2. The SDPUC granted the Telephone Authority a waiver of the toll limitation requirement until December 31, 1998. SDPUC ETC Decision at 3, ¶ XXI; id. at 5, ¶ VI.

10. As required by 47 C.F.R. § 54.201(d)(2), the Telephone Authority advertises the availability of its services within its service area. TR at 126 (describing public demonstration “featuring an interactive video services vendor.”), 130 (setting forth plans to expand marketing activities); Affidavit of J.D. Williams ¶ 5; SDPUC ETC Decision at 3, ¶ XVIII; Certification of J.D. Williams ¶ 2. Prior to this filing, the Telephone Authority has not generally advertised the prices charged for all of the above-identified services, but will do so in accord with any specific advertising standards that the Commission may develop. The SDPUC ordered the Telephone Authority to comply with its advertising requirements, which include advertisement of the prices it charges for its services. SDPUC ETC Decision at 4, ¶ XXIII; *id.* at 5, ¶ VIII.

Thus, the Telephone Authority qualifies for ETC designation for the telephone exchanges it operates within the exterior boundaries of the Reservation, which constitutes its service area. The Telephone Authority requests that the Commission grant it retroactive universal service support funds because it met the requirements for ETC designation prior to January 1, 1998. See Affidavit of J.D. Williams (dated November 13, 1997). The Telephone Authority has taken steps to receive ETC designation in a timely manner by: 1) receiving ETC designation from the Cheyenne River Sioux Tribe on November 5, 1997, see Resolution No. 337-97-CR; 2) filing with the SDPUC for ETC designation in the event the SDPUC has jurisdiction to implement the Communications Act within Reservation boundaries, which the Telephone Authority does not admit, see SDPUC ETC Decision; and 3) filing the instant petition within two weeks of the Commission’s issuance of its Public Notice dated December 29, 1997 governing such petitions.

V. CONCLUSION

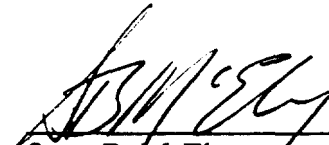
Because the SDPUC lacks jurisdiction within Reservation boundaries, the Communications Act requires that the Commission determine the Telephone Authority's eligibility for ETC designation. Accordingly, the Telephone Authority respectfully requests that the Commission:

- (a) grant a waiver of the requirement to provide "toll limitation" service; and
- (b) confirm or designate the Telephone Authority as an ETC for the local exchange area that constitutes its present service area in South Dakota as described herein.

Dated

Jan 6, 1998

Respectfully submitted,



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Greene, Meyer & McElroy, P.C.
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Boulder, Colorado 80302
(303) 442-2021

*Attorneys for the Cheyenne River Sioux
Tribe Telephone Authority*

CERTIFICATE OF SERVICE

I hereby certify that I have, this ____ day of _____, 1998, hand-delivered a true copy of the foregoing Petition of the Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, FCC 97-419 to the following:

Chairman William Kennard
Federal Communications Commission
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Washington, D.C. 20554

Commissioner Susan Ness
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Commissioner Harold Furchtgott-Roth
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that the original and five copies were mailed
to:

Magalie Roman Salas, Secretary
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that three copies were mailed to:

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Universal Service Branch
Accounting and Audits Division
Common Carrier Bureau
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Cheyenne River Sioux Tribe Telephone Authority
January 6, 1998

and two copies were mailed to:

William Bullard, Executive Director
Cameron Hoseck, Special Assistant
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